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March 27, 2002

BY FACSIMILE

The Honorable Mitch Daniels
Director
Office of Management and Budget
Washington, DC 20503

Dear Director Daniels:

This letter constitutes the formal comments of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs on the March 18, 2002 draft fifth report to Congress by the Office of Management and Budget (OMB) on the costs and benefits of Federal regulations and paperwork. This report was statutorily required to be submitted with the President's Budget on February 4th. I am disappointed that OMB did not at least submit its draft report in time for the Subcommittee's March 13th regulatory accounting hearing. However, at the hearing, OMB's Office of Information and Regulatory Affairs (OIRA) Administrator John Graham committed that next year's draft report will be submitted with the President's Budget. I am pleased with this commitment since it will allow Congress in the future to simultaneously review both the on-budget and off-budget costs associated with each Federal agency and each Federal agency program imposing regulatory or paperwork burdens on the public.

The law requires OMB to estimate the total annual costs and benefits for all Federal rules and paperwork in the aggregate, by agency, by agency program, and by major rule. OMB's draft report is an improvement over its four previous regulatory accounting reports. For example, for the first time, it includes aggregate estimates of the costs and benefits of major rules for eight agencies (p. 52). However, it is still not presented as an accounting statement and it still does not include any estimates by agency program.

To assist OMB in preparing estimates by agency and by agency program, I recommend that OMB issue annual OMB Bulletins to the agencies like it does for paperwork reduction. In fact, agency proposed estimates of aggregate and new paperwork burden help OMB prepare a government-wide Information Collection Budget to manage paperwork burden on the public. OMB's regulatory accounting Bulletins should require each agency to submit estimates of its

aggregate and new regulatory burden for the agency as a whole and for each of the agency's major regulatory programs.

Another problem is inconsistency in agency estimation methodology. OMB's draft report acknowledges that not all agencies are consistently following OMB's recommended methodology for estimating costs and benefits. In fact, OMB explained that it applied a uniform format in the draft report "to make agency estimates more closely comparable with each other" (p. 129) and that "it may be critical in the coming year to take a more precise look at the variety of agency practices in use" (p. 136). I also applaud OMB's decision that a regulatory impact analysis (RIA) "is necessary regardless of whether the underlying statute governing agency action requires, authorizes or prohibits cost-benefit analysis as an input to decisionmaking" (p. 23). RIAs are needed for all major rules to ensure an accurate regulatory accounting report.

In its August 1998, January 2000, and May 2001 comment letters on OMB's draft second, third and fourth reports, the Subcommittee expressed its concern about the absence of any mandatory systematic and standardized procedure agencies must use to collect and report data to OMB on the impacts of all existing, revised, and new regulations. The Subcommittee stated, "we expect OMB to require all executive branch agencies to follow uniform systematic standardized procedures for collecting and reporting data to OMB and to request that the independent regulatory agencies do the same. At a minimum, there must be a standardized procedure for collecting and reporting data on the costs and benefits for all existing rules."

To improve the consistency of future agency estimates of costs and benefits, I additionally recommend that OMB include in its final report an agency "report card" (similar to its "Executive Branch Management Scorecard" for 15 agencies, p. 49, Fiscal Year 2003 Budget of the U.S. Government) for agency RIAs that highlights their strengths and weaknesses.

Besides an accounting statement, the law requires OMB to submit an associated report, including an analysis of impacts of Federal regulation on State and local government and on small business. I am disappointed by the draft report's 2-page discussion of the impact of Federal rules and paperwork on small business (pp. 121-2). At a minimum, I recommend that OMB include more information from the 2001 Crain-Hopkins analysis commissioned by the Small Business Administration.

Besides an accounting statement and an associated report, the law requires OMB to submit recommendations for reform. I compliment OMB on its request for the regulated public to identify problematic guidance documents (pp. 92-98). The draft report cites the Subcommittee's investigation of agency guidance documents and its resulting October 2000 Report entitled "Non-Binding Legal Effect of Agency Guidance Documents" (House Report 106-1009) (p. 93).

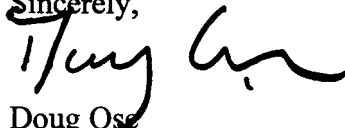
The House Report included orchestrated letters from agency chief legal officials stating that all of their guidance documents are not legally binding. Unfortunately, this non-binding legal effect is not always clear to the public. Therefore, the orchestrated letters concluded by saying, "We

recognize the importance of using guidance properly, and we have taken - and will continue to take - appropriate steps to address the concerns that guidance not be used as a substitute for rulemaking and to make the legal effect of our documents clear to the public.” In addition, the March 1996 Congressional Review Act (CRA; Title II, Sec. 251 of Public Law 104-121, codified at 5 U.S.C. ch. 8) requires any guidance document that contains a statement “with general ... applicability and future effect” to be submitted for Congressional review before it can become effective. Therefore, as a matter of law, any post-CRA guidance document which was not submitted for Congressional review has no legal effect (5 U.S.C. §801(a)(1)(A)).

OMB’s report includes much information unrelated to regulatory accounting¹, including Chapters I and III and Appendices A, B and E. I recommend that the final report co-locate all of the regulatory accounting information (now in Chapters II and IV and Appendices C, D and F²) and locate any other information at the end of the report. I fear that public comment on the non-regulatory accounting parts of the draft report may distract OMB from focusing on and improving the required regulatory accounting information. Lastly, I want to again state how pleased I am to see that OMB has taken a more proactive and analytical role in regulatory policy, including its return, prompt, and post-review letters.

Thank you for your attention to my concerns.

Sincerely,



Doug Ose
Chairman

Subcommittee on Energy Policy, Natural
Resources and Regulatory Affairs

cc: The Honorable Dan Burton
The Honorable John Tierney

¹For example, the draft announces that OIRA is “in the process of forming a scientific advisory panel that will suggest initiatives to OIRA, evaluate OIRA’s ongoing activities, comment on national and international policy developments of interest to OIRA, and act as a resource and recruitment mechanism for OIRA staff” (p. 44), and includes a chapter entitled “Regulatory Governance Abroad.”

²OMB’s draft report incorrectly calls the four-word law change (“and each year thereafter”) in December 2000 the Regulatory Right-to-Know Act. In July 1999, the House passed H.R. 1074, the comprehensive “Regulatory Right-to-Know Act,” by a 254-157 vote. During the 106th Congress, the Senate Governmental Affairs Committee failed to report out its companion bill (S. 59).